# Discovery Policy

**United States Attorney's Office**
**Western District of New York**

**October 2010**
**(FINAL REVISION)**

**PROTECTED INFORMATION**
**ATTORNEY CLIENT PRIVILEGE/WORK PRODUCT DOCTRINE**
**FOIA/PRIVACY ACT PROTECTED - 5 U.S.C. §552(b)**

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***Disclaimer***

*This Policy and the guidance contained herein are subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. See, United States v. Caceres, 440 U.S. 741 (1979).*

## I. What to Disclose

**A. Federal Rule of Criminal Procedure 16** - Rule 16(a) sets forth the government's basic discovery obligations. The obligation to provide Rule 16 discovery continues up to and during trial. Under Rule 16(a), the government is required to disclose the following:

1. **Oral Statements- Rule 16(a)(1)(A) -** The Government must disclose the substance of any **oral statements** made by the defendant in response to interrogation by a known government agent which the government intends to use at trial.

2. **Written or Recorded Statements of the Defendant- Rule 16(a)(1)(B)** - The Government must disclose and make available for inspection, copying or photographing, all of the following:

   a. Relevant **written or recorded statements of the defendant**, if

      i. the statement is within the government's possession, custody, or control; **and**
      ii. the attorney for the government knows or through diligence could know that the statement existed (**not limited to statements made to law enforcement**);

   b. Includes that portion of any written record that contains the substance of any relevant oral statement made by the defendant - before or after arrest - if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent;

   c. Includes the **defendant's recorded testimony before a grand jury** or at prior proceeding relating to the charged offense.

**EXAMPLES OF STATEMENTS THAT MAY BE PART OF RULE 16 DISCOVERY:**

These statements may include the following (non-exhaustive):

- recordings, wiretaps, emails, text messages, FaceBook information, YouTube etc.
- handwritten notes, confessions
- signed documents; *e.g.*, Miranda waiver form, consent to search
- oral statements, whether or not memorialized in reports; anything defendant said to agents or others
- excerpts from reports pertaining to statements
- pedigree
- bonds
- financial statements
- pretrial reports - you should not have these reports but if you do, or have information from such a report, consider whether you need to disclose and if so how.
- probation reports - can be tricky issue - not usually disclosed but you must review it for information that you may have to disclose and consider how to disclose.

3. **Organizational Defendants- Rule 16(a)(1)(C)** - Government must disclose statements described in Rule 16(a)(1)(A) and (B) **if the person making the statement:**
   a. was legally able to bind the defendant because of that person's position as the director, officer, employee or agent; or
   b. was personally involved in the conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of the person's position as a director, officer, employee, or agent.

4. **Defendant's Prior Record- Rule 16(a)(1)(D)** - The government must disclose the **defendant's prior record/criminal history**.

5. **Documents and Objects- Rule 16(a)(1)(E)** - The government must disclose all **documents and other tangible evidence** the government plans to introduce in it case-in-chief or which are material to the defense or if the item was obtained from or belongs to the defendant.

6. **Reports of Examinations and Tests - Rule 16(a)(1)(F)**
   a. The government must disclose reports of physical, mental, or scientific examinations (such as handwriting analysis, drug analysis, fingerprint reports, etc.) to be introduced by the government in its case-in-chief or which are material to the defense; and
   b. Expert witness - summary of opinion, bases and reasons, qualifications.

7. **Special Situations**:

   a. Taint Teams and Firewalls - if there is a firewall/filter team, make sure filter team AUSA is passing on discoverable information to prosecution team AUSA. If using a taint team be sure to consult with the Office Professional Responsibility Officer (PRO).

   b. Regardless of whether a taint team is used, we are obligated to comply with all discovery obligations.

**Office Policy - Rule 16**

- **While Rule 16 makes the government's discovery obligations contingent upon a defendant's request, it is the policy within this Office to disclose such material regardless of whether requested by the defense. Such disclosure must be made as near the time of arraignment as possible but not later than the discovery date set by the Court. Disclosure at or before arraignment is encouraged.**
- **Pursuant to Local Rule 12.1(b), AUSAs must be prepared to discuss discovery schedules with the Court and counsel at the time of arraignment.**
- **Any delay in providing discovery under Rule 16 must be approved by a supervisor. Discovery can not be delayed for tactical reasons.**

*Practice Tip - Pursuant to Rule 16(b), if the defendant requests Rule 16 disclosure and we provide it, then we are entitled to* ***reciprocal discovery.***

*Practice Tip: Pursuant to Rule 16(d), we can, with good cause, ask the Court ex parte to deny, restrict, or defer discovery or inspection, or grant other appropriate relief. All ex parte requests must be accompanied with a filed notice of ex parte submission and must have prior approval of a supervisor.*

## B. Exculpatory and Impeachment Material

### 1. Brady and Giglio

As prosecutors, we are constitutionally required to disclose exculpatory and impeachment information when such information is material to guilt or punishment, ***regardless of whether a defendant makes a request for such information***. Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972). Exculpatory and impeachment information is deemed material to a finding of guilt when there is a reasonable probability that effective use of that information will result in an acquittal.

Importantly, however, Department policy set forth in USAM 9-5.001, *Policy Regarding Disclosure of Exculpatory and Impeachment Information*, requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263, 280-281 (1999). Prosecutors must take a broad view of materiality and err of the side of disclosure. Under DOJ Policy, a prosecutor must:

a. Disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

b. Additionally, a prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence — including but not limited to witness testimony — the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference

between conviction and acquittal of the defendant for a charged crime.

c. The New York Rules of Professional Conduct, Rule 3.8 (b) state:

> A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

d. The local rules of the District Court for the Western District of New York require you to conform to the New York Rules even if you are admitted in another state. If, however, you are admitted in a jurisdiction other than New York, you may also be required to follow the disciplinary rules for that jurisdiction, which may be even broader than those set forth in this policy. If you have a question in this regard, you must contact the Office PRO.

**Office Policy/Brady-Giglio**

- **When considering Brady/Giglio obligations, take a broad view of materiality and err of the side of disclosure.**
- **AUSAs must comply with the District's Brady/Giglio Plan as set forth within the Office Manual - *available on the WDNY intranet website.* Presently, the Giglio Coordinator is the Appellate Chief.**
- **Agent reports of witness interviews are to be treated as witness statements and disclosed in accordance with the policy concerning the discovery of witness statements. The reason for such policy is that the statement may be considered Giglio impeachment material.**

*Practice Tip: All benefits to a witness must be disclosed to the defense. This includes speaking to a state prosecutor to encourage a favorable sentence in the witness's state case - even if you do not know if it had an effect on the ultimate sentence imposed.*

## C. Witnesses' Statements - Jencks Act and Rule 26.2

### 1. What is a statement?

a. The Jencks Act (18 U.S.C. § 3500) and Fed. R. Crim. P. 26.2 require disclosure of a witness's statements that relate to the subject matter of the witness's testimony at trial or a hearing. Both the Jencks Act and Rule 26.2 define "statement" similarly.

b. Specifically, a statement includes:
   i. a written statement that the witness makes and signs or otherwise adopts and approves.
   ii. a ***substantially verbatim***, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording (does not mean that statement has to be precisely verbatim).
   iii. Grand Jury testimony

c. What about E-mails?

**WDNY E-Mail Policy**

**Any substantive e-mail communication from/to an agent who is a potential witness or from/to any witness which relate to the agent's or witness's potential testimony, must be preserved, printed, and timely provided to the U.S. Attorney's Office for review and for potential use as discovery material just like any more formal written agency reports. "Substantive" communications include summaries of investigative activity, discussions of the relative merits of evidence, characterization of potential testimony, interactions with witnesses/victims, and issues relating to credibility.**

### 2. What is not a statement?

Generally, an agent's report of interview (e.g., FBI "302" or "DEA-6"), is not considered a statement of the witness who was interviewed, unless, as noted above, the report contains a substantially verbatim recital of the witness's statement, or the witness reviews and adopts the report. A witness may be deemed to have adopted the report or notes that were taken during an interview if the witness agrees with an agent's oral recitation of his notes or report to see if the notes or report is correct. ***However, as a matter of policy, this Office generally treats agent reports of witness interviews as witness statements and discloses them in accordance with the policy concerning the discovery of witness statements***. See, Office Policy/Brady-Giglio, above.

### 3. Redaction of statements

Rule 26.2(c) provides that where a statement of a witness contains some material that is relevant to the case, but other material that is either privileged or does not relate to the subject matter of the witness's testimony, the government may call upon the trial court to review *in camera* the statement in its entirety and excise any privileged or unrelated portions of the statement before it is disclosed to the defense. This implies that the government may not excise such a statement on its own.

*Practice Tip: This rule is one good reason to take separate statements from a single witness for separate investigations or cases.*

### 4. Notes of interview (agents and prosecutors)

a. In the Second Circuit, the law regarding the obligation of enforcement agents to maintain their notes after they have used them to prepare a more formal and complete summary of the interview is not crystal clear, although the overall consensus seems to be that agents need not retain their notes where the notes are incorporated into a final report that is provided to the defense. United States v. Elusma, 849 F.2d 76, 79 (2d Cir. 1988); *but see*, United States v. Paoli, 603 F.2d 1029, 1036-37 (2d Cir. 1979). What is clear,

however, is that if an agent's notes contain Brady or Giglio material that is not included in the agent's formal summary of the interview, the notes remain relevant and the Brady/Giglio material must be disclosed. Similarly, a prosecutor's notes of a witness interview (as opposed to notes containing mental impressions, personal beliefs, trial strategy and legal conclusions) may have to be disclosed, or the relevant information contained therein, if the notes reflect exculpatory or impeachment information. *Most, if not all, federal agencies are required to keep their notes; be sure to ask for them.*

b. Also, the government may not limit its obligation to disclose exculpatory or impeachment evidence of which it is aware either by simply declining to make a written record of the information in the first place or by omitting the information in a final draft of the memorandum of interview and destroying the notes that contain that information. The substantive demands of Brady and Giglio are not thwarted by the manner in which the government treats or packages exculpatory information.

c. Generally, you should NOT interview or prepare witnesses by yourself. Always have an agent present. If you take notes - realize they may have to be turned over to the defense. If an AUSA meets with a witness solely for purposes of preparing that witness for trial, then notwithstanding the fact that the AUSA may not take notes does not relieve the AUSA of the obligation to note any inconsistencies and disclose any statements which are Brady or Giglio material.

**5. Applicability of the Jencks Act and Rule 26.2.**

a. The Jencks Act applies to trials.

b. Rule 26.2 applies to:

i. preliminary hearings

ii. detention hearings

iii. suppression hearings

iv. sentencing hearings

v. hearings to consider revocation of probation or supervised release

vi. 2255 hearings

**Office Policy - Jencks Act/Rule 26.2**

- **Unless unrelated to the case, or absent unusual circumstances such as potential serious threats to witness safety, national security, or an ongoing criminal investigation, it is the Office Policy, in the exercise of an expansive discovery practice, to disclose reports of interview to defense counsel together with other Jencks Act material. Remember, even though a report of interview is not generally a statement of the witness interviewed, it is a statement of the agent who prepared the report. The report must be disclosed if that agent will be a witness and the report relates to the subject matter of the agent's testimony.**
- **All witness interviews must be memorialized by an agent or law enforcement officer and you must be provided with a copy of that report. This is necessary whether or not the report is Jencks material, as the report may contain information inconsistent with a witness' testimony at trial and thus it is Brady/Giglio material. See, above.**

## D. Government's Disclosure Obligations Where Defendant Asserts Certain Defenses

### 1. Notice of Alibi Defense - Rule 12.1

If, in response to a government request pursuant to Rule 12.1(a)(1), the defendant provides specific notice to the government of an intention to assert an alibi defense, the government is then required within 14 days after the defendant's notice, and no later than 14 days before trial, to give the defendant in writing:

a. the name, address and telephone number of each witness the government will rely on to establish that the defendant was present; and
b. each government rebuttal witness to the defendant's alibi defense

*Practice Tip: In view of the government's obligation to disclose certain information about its witnesses if the defendant responds to the government's request, consideration should be given to making this request closer to trial rather than earlier in the prosecution*

**2. Notice of Insanity Defense; Mental Examination -Rule 12.2**

If the defendant provides specific notice to the government that defendant intends to assert a defense of insanity at the time of the alleged offense, or introduce expert evidence relating to a mental disease or defect or any other mental condition bearing on the defendant's guilt or issue of punishment in a capital case, the court MUST, upon the government's request, order the defendant to be examined under 18 U.S.C. § 4242

**3. Notice of Public Authority Defense - Rule 12.3**

If the defendant provides specific notice that defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence at the time of the alleged offense, the government is required to serve a written response within 14 days after receiving the defendant's notice, but no later than 21 days before trial, admitting or denying that the defendant exercised the public authority identified in the defendant's notice. Thereafter, reference should be made to the Rule in order to assure that subsequent discovery obligations are met.

## E. Mandatory Redaction of Certain Information Filed with the Court

1. Rule 49.1 requires that, unless otherwise ordered by the court, we are required to redact certain categories

of information filed with the court. Categories of information that must be redacted include:

a. social security numbers – use last four digits

b. taxpayer identification numbers – use last four digits

c. birth dates – use year

d. names of individuals known to be minors – initials only (see also, 18 U.S.C. § 3509(d)(2)

e. financial account numbers – use last four digits

f. home address of individuals – city and state only

2. Categories of documents exempt from the Redaction Requirement are set forth in Rule 49.1(b).

*Practice Tips: Have two sets of documents at trial (could be trial exhibits or 3500 Material). Seek permission from the court to offer the redacted version into evidence unless it is necessary to offer the unredacted version. Make sure that redacted version is filed publicly. Be mindful that the trial transcript must also be redacted if it contains information that must be redacted pursuant to Rule 49.1.*

## F. Classified Material

1. The Classified Information Procedures Act ("CIPA"), Title 18, United States Code, Appendix 3, controls the disclosure of classified information in discovery.

2. If your case involves or implicates classified information, contact the Office's National Security Coordinator at the earliest possible juncture.

## G. Title III Evidence

As part of voluntary discovery in cases involving Title III/state wiretap interception of wire, electronic and/or oral communications, Office policy is that the following should be disclosed:

1. Application(s) and agent affidavit(s)
2. Interception order(s)

3. Sealing order(s)
4. 10 day letters/progress reports
5. Recordings of intercepted communications
6. Transcripts of intercepted communications

Additional disclosure may be made depending of the facts of a particular case, defense request, or other case-related reason. When disclosing any Title III information, thought should be given to redacting the names of persons not yet charged, information which will identify informants, information about uncharged criminal conduct, or other information which should not be made public.

## II. Where To Look For It

### A. Who is Part of the Prosecution Team?

1. We must locate and disclose all discoverable materials noted above in Section I, including information that is exculpatory and/or impeaching of a prosecution witness, that is within the possession of the "prosecution team." This team includes the agents and law enforcement officers who helped to develop the case or worked with or under the supervision of the prosecutor during the investigation. The "prosecution team," however, may at times include other agencies. For a more complete discussion of who might be included in the "prosecution team" for discovery purposes, see pages 2-3 of the Deputy Attorney General's January 4, 2010 "Guidance For Prosecutors" memo.

2. Under Second Circuit caselaw, the "prosecution team" has variously been defined as follows:

   a. United States v. Stewart, 433 F.3d 273, 298 (2d Cir. 2006) - "[T]he propriety of imputing knowledge to the prosecution is determined by examining the specific circumstances of the person alleged to be an 'arm of the prosecutor,'" which includes such factors as whether the person was involved with the investigation, interviewed witnesses, gathered facts, or developed prosecutorial strategy.

   b. United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) - "[K]nowledge on the part of persons employed by a different office of the government

does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt 'a monolithic view of government' that would 'condemn the prosecution of criminal cases to a state of paralysis.'"

c. United States v. Giffen, 379 F. Supp. 2d 337, 343 (S.D.N.Y. 2004) - "Documents that the Government has reviewed or has access to must be provided to aid a defendant in preparing his defense. . . . The prosecutor need not, however, produce documents from agencies that did not participate in the investigation of the defendant or documents of which it is unaware. . . . In other words, the prosecutor is not required to conduct a separate investigation for the purpose of responding to a defendant's discovery requests."

**B.** **What to Review/Request?** All evidence and other potentially discoverable material gathered during the investigation, whether in our custody or the custody or control of the other members of the prosecution team, should be reviewed. Special care should be given to gathering exculpatory/impeachment information and witnesses' statements, as discussed above in Section I. Specifically, you should review, or cause to be reviewed by someone intimately familiar with the law and DOJ policy on the disclosure of exculpatory and impeachment information, the following:

1. **All of the agency's investigative files.**

2. **All of the CI/CW/CHS/CS files, by whatever name the agency labels these.** Agencies who make use of confidential informants and cooperating individuals have their own established procedures for retaining information about those witnesses. The agencies may keep multiple files containing different types of records or information. Thus, inquiries to agencies about informants should include a review of every kind of file that might contain information about the individual. Among other things, you should investigate and disclose any information obtained in the following

areas when you are going to have a confidential informant or cooperating witness testify at trial or a hearing:

a. the witness's relationship with the defendant

b. the witness's motivation for cooperating/testifying

c. drug and alcohol problems

d. all benefits the witness is receiving, including:

i. Monetary payments - how are they calculated?

ii. Expenses, costs, housing - is anyone paying?

iii. Immigration status for the witness and/or family members

iv. Arrests - intervention by law enforcement

v. Taxes - has the witness paid taxes on informant payments?

vi. any notes, diaries, journals, e-mails, letters, or other writings by the witness

vii. prison files, tape recordings of telephone calls, and e-mails, if the informant is in custody

viii. criminal history

ix. if the witness has acted as an informant in the past, such prior service may constitute impeachment evidence that must be disclosed. See, United States v. Malpeso, 115 F.3d 155 (2d Cir. 1997).

3. **Evidence/information obtained via subpoena, search warrants, or other legal process.** With respect to electronically-stored evidence, including e-mails, sufficient time must be allotted for a search of hard drives, disks and other storage hardware. These searches may take a long time, so they should be undertaken well before indictment.

4. Evidence/information gathered by civil or regulatory agencies in parallel investigations.

5. Substantive communications/correspondence including e-mails, text messages, and letters, between and among prosecutors, agents, witnesses, victims, victim-witness coordinators, etc.

6. Potential Giglio information about non-law enforcement witnesses (including declarants whose hearsay statements the government might seek to introduce at trial). Ask the case agent to run a criminal history report on all non-law enforcement witnesses.

7. Any agent notes.

## III. When To Disclose It

### A. Rule 16

**Office Policy - Timing of Rule 16 Discovery**

**Disclosure must be made as near the time of arraignment as possible but not later than the discovery date set by the Court. Disclosure at or before arraignment is encouraged.**

### B. Exculpatory and Impeachment Material

#### 1. Brady Material

a. Constitutional requirement - in time to give defense opportunity to make effective use of material

b. DOJ policy - reasonably promptly after it is discovered

**Office Policy - Timing of Brady Discovery**

**Disclose Brady material immediately.**

c. Court's Discretion - District courts have broad discretion to set timetables for pre-trial disclosure and AUSAs should consider making *in camera* motions to delay disclosure if there are security concerns

2. **Giglio Material**

a. Constitutional requirement - No constitutional requirement to disclose impeachment material before trial

b. DOJ policy - disclosed at a reasonable time before trial to allow the trial to proceed efficiently – unless countervailing concerns such as witness safety and national security

**Office Policy - Timing of Giglio Discovery**

**Giglio material will be disclosed in accordance with district court's order re: timing of disclosure - typically at the time we file our pretrial submissions and disclose Jencks Act materials. The Supreme Court has held that there is no constitutional requirement that the government disclose impeachment information prior to a guilty plea. United States v. Ruiz, 536 U.S. 622 (2002). Nonetheless, if the AUSA is aware of impeachment information so significant that it undermines the AUSA's confidence in the defendant's guilt, the AUSA should disclose the information to the defense and advise their supervisor.**

3. **Witness Statements - Jencks Act/Rule 26.2**

a. Constitutional/Statutory requirement - following direct testimony of witness.

**Office Policy - Timing of Jencks Act/Rule 26.2 Discovery**

- **Hearing or other pre-trial proceeding (Rule 26.2):**
  - **Disclosure to be made sufficiently in advance of hearing to allow defendant to make use of it.**
- **Trial (3500)**
  - **Disclosure to be made in accordance with district court's order re: timing of disclosure - typically at the time we file our pretrial submissions.**

## IV. How to Disclose

A. While we have, as an Office, adopted an expansive discovery in a case, do **NOT** refer to the expansive discovery practice as "open file discovery." Our files should not ever be completely open (to preserve attorney-client privileged information and the work product doctrine) and there may be times when another government agency might have some material or information of which you are not aware. The use of the term "open file" is therefore inexact and potentially misleading.

**Office Policy - How to Disclose Discovery**

- **Whether made through the physical or electronic transfer of material, AUSAs should keep an exact copy of the materials disclosed.**
- **Always formalize disclosure by writing a letter stating with specificity: (1) what was disclosed; (2) when it was disclosed; and (3) how it was disclosed.**
- **Electronic Disclosures must be made in accordance with ALS Policies and Procedures Memo.**
- **Whenever privacy, safety, or other considerations warrant, AUSAs must consider the use of protective orders to limit the access to and use of discovery material provided by the government in furtherance of its discovery obligations under this Discovery Policy. A sample proposed protective order is available on R-Docs. Further, consideration should be given filing a motion or including a point in the trial memorandum requesting the return of 3500 and Giglio material at the conclusion of the trial.**

## V. Cases Involving National Security

As a general rule, National Security related investigations and prosecutions are not subject to this policy and guidance. The following is guidance issued by the Department of Justice concerning issues pertaining to discovery in cases involving national security:

> Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult NSD regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.
>
> Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;

- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;

- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;

- Other significant cases involving international suspects and targets; and

- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.